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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-200281

DATE: February 19, 1981

MATTER OF: Joseph S. Clinger, Jr. - Backpay -
[Claim For Backpay Resulting From Reduction-In-Force]

DIGEST:

Where the Merit Systems Protection Board determines employee's appeal untimely, the employee is not entitled to relief for reduction-in-grade incident to a reduction-in-force since there has been no determination by the "appropriate authority" as required by 5 U.S.C. § 5596 (1976) that reduction-in-grade was an unjustified or unwarranted personnel action.

Mr. Joseph S. Clinger, Jr., a civilian employee of the United States Air Force, appeals the denial of his claim for reinstatement to grade GS-13 and backpay stemming from a reduction-in-force (RIF) which caused him to be reduced to a grade GS-11. In a settlement certificate dated August 29, 1979 (Z-2792013), our Claims Division denied the claim on jurisdictional grounds, stating:

✓ "The Back Pay Act authority of 5 U.S.C. § 5596 is remedial in nature, providing a remedy for wrongful reductions in grade, removals and suspensions and other unjustified or unwarranted actions affecting pay or allowances. By its express terms it provides a remedy only when it has otherwise been determined that the employee has suffered a reduction in pay as the result of an unjustified or unwarranted personnel action.

"The 'appropriate authority' referred to in section 5596 of title 5 United States Code, is (1) a court having jurisdiction, (2) the Comptroller General, or (3) the Civil Service Commission.

"In the case of an employee who has suffered a reduction in pay as the

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consequence of a reduction-in-force action, the Civil Service Commission is the appropriate authority, having power to require correction of the personnel action under the procedure now set forth at 5 C.F.R. §§ 351.901, et seq. (1977)."

On September 17, 1979, the Chicago Field Office of the Merit Systems Protection Board (formerly the Federal Employee Appeals Authority, United States Civil Service Commission) rejected Mr. Clinger's appeal as untimely for lack of due diligence in pursuing the appeal.

The Board stated:

"Since the action was initiated (by notice of reduction in force dated March 25, 1976) prior to January 11, 1979, it is governed by the provisions of parts 351 and 772 of title 5 of the Code of Federal Regulations. 5 C.F.R. § 351.901(a) provides that an employee affected by a reduction in force may appeal the action not more than 15 calendar days after the effective date of the action. In this case, the appellant's initial letter of appeal was filed nearly eighteen months after his reduction in grade. 5 C.F.R. § 772.302 provides that the time limit for appealing may be extended when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

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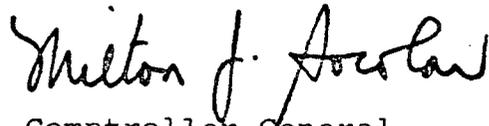
"The appellant has placed the blame for his late appeal entirely upon the agency's failure to notify him of his appeal rights.. However, when the agency does not provide

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notice of appeal rights, the above quoted provision of the regulations clearly places the burden on the employee to exercise 'due diligence in discovering and pursuing the administrative appeal available.' We find that the appellant has not shown that he exercised the required due diligence in discovering and pursuing his appeal rights. Accordingly, we find no basis for accepting the appellants untimely appeal."

The Merit Systems Protections Board Office of Appeals upheld the decision and notified Mr. Clinger of its refusal to reopen the case by letter dated March 4, 1980. Mr. Clinger now seeks review by our Office.

Our decisions have clearly established that the Merit Systems Protections Board is the appropriate authority in the case of an employee who suffers a reduction in pay because of a RIF action. See Wayzetta M. Hoffman, B-187221, June 21, 1977; 5 C.F.R. § 351.901 (1980). Since there has been no determination by the Board that Mr. Clinger's reduction in grade was the result of an unjustified or unwarranted personnel action, he is not entitled to relief under the provisions of 5 U.S.C. § 5596 (1976). The decision of our Claims Division denying the claim for backpay is therefore affirmed.



For the Comptroller General
of the United States